

The General Agreement on Tariffs and Trade (GATT) and the Law of the Sea (LOS) Convention: A Critical Comparison of Arbitration Provisions**

The General Agreement on Tariffs and Trade¹ (GATT) and the Law of the Sea Convention² (LOS Convention) contain what are perhaps the most comprehensive and complex dispute-resolution mechanisms of any such agreements. Of greatest importance among these dispute-resolution mechanisms are the frameworks for arbitration provided in each agreement. Together these two frameworks provide a paradigm for drafting arbitration provisions in multilateral agreements.

Arbitration under the GATT and the LOS Convention is characterized more by similarities than by differences. Not the least of these similarities is each treaty's recognition that, in situations calling for nations to relinquish some measure of their sovereign rights, the most politically feasible means of dispute resolution is often found in the establishment of arbitral bodies. It becomes the task of treaty negotiators to draft provisions that: (1) trigger arbitration, (2) govern how arbitration is to proceed (both the LOS Convention and the GATT leave procedure largely to the arbitral panel), and (3) provide some means of enforcing arbitral decisions. For

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1. General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, T.I.A.S. No. 1700, 55 U.N.T.S. 194.

2. Convention on the Law of the Sea, U.N. Doc. A/CONF.62/L.98/Rev.4 (1981). Between December 6 and 10, 1982, 119 nations signed the LOS Convention. The United States has not signed for reasons set out fully in Malone, *The United States and the Law of the Sea*, 24 VA. J. INT'L L. 785 (1980); see also Ickle, *Exchange between Expert Panel and Reagan Administration Officials on Non-Sea Bed Mining Provisions of LOS Treaty*, 79 AM. JUR. INT'L L. 151 (1985).

guidance on drafting these provisions, future negotiators would be well-advised to study the provisions of the GATT and the LOS Convention.

A comparison of the two arbitration frameworks also suggests itself for analytical reasons. Comparing the arbitration provisions of one treaty with those of the other allows a thorough understanding of each respectively. Issues not evident from studying the language of a single treaty are suggested by the presence (or absence) of similar or dissimilar language in the second.

The comparison is even more useful in light of the lengthy and intensely political negotiating histories of the two treaties' dispute-resolution mechanisms. The dispute-resolution mechanisms of both treaties evolved in multilateral negotiations involving global political pressures to encourage relinquishment of some measure of state sovereignty for the common good.³ The LOS Convention attempts to foster global recognition of and respect for the commonality of ocean resources. The GATT institutionalizes a preference for unfettered trade on a most-favored-nation basis. Both treaties attempt to cover their subject matter exhaustively, requiring comprehensive dispute-resolution mechanisms.⁴ Drafters of comprehensive dispute-resolution mechanisms must remember that the extent to which states are willing to relinquish their sovereign rights is dependent upon their ability to influence the behavior of other states.⁵ Negotiating arbitration procedures in this context calls for balancing conflicting national and international goals in the manner of a diplomatic horsetrader.⁶ Finally, the force and effect of a treaty's arbitration procedure is only as strong as the signatory governments' agreement as to what constitutes correct government behavior.⁷

Section I of this article discusses the relevant treaty provisions and describes the "functional" approach of the LOS convention and the "an-

3. As a matter of historical background, it is interesting to note that the negotiation of the arbitration provisions of both treaties were conducted at approximately the same time. While the GATT in chief was negotiated immediately after World War II, its current arbitration procedure was not negotiated until the Tokyo Round of multilateral trade negotiations held from 1973 through 1979. The LOS Convention, including its arbitration provisions, took form during plenary debates at the Third United Nations Conference on the Law of the Sea (UNCLOS) from 1975 through 1982.

4. Regarding the LOS Convention, "The [dispute-resolution] provisions attempt to provide dispute-settlement mechanisms for *all* matters of contention arising out of the law of the sea—boundary disputes, navigation and pollution issues, fishery matters . . . and transfer of technology problems, to name a few." See Gaertner, *The Dispute Settlement Provisions of the Convention on the Law of the Sea: Critique and Alternatives to the International Tribunal for the Law of the Sea*, 19 SAN DIEGO L. REV. 577, 579-80 (1982).

5. See Hudec, *GATT Dispute Settlement after the Tokyo Round: An Unfinished Business*, 13 CORNELL INT'L L.J. 145, 149-50 (1980).

6. Gaertner, *supra* note 4, at 578-79.

7. Hudec, *supra* note 5, at 150.

tilegalist" approach of the GATT. Section II explores the requirements of the two agreements for consultation prior to the initiation of arbitration and how the failure to resolve a dispute by consultation triggers more formal dispute-resolution mechanisms. Section III discusses the exceptions in the LOS Convention to compulsory arbitration, which arguably undercut significantly the force of its arbitration provision. Section IV addresses the scope of jurisdiction under the two conventions, i.e., the kinds of actions or disputes that are "actionable." Section V analyzes the question of applicable law; Section VI, the selection of a tribunal; Section VII, the important subject of remedies; and Section VIII, the arbitral proceedings.

I. Preliminary Matters

A. TREATY PROVISIONS

1. *The LOS Convention*

Part XV of the LOS Convention (Articles 279 through 299) contains the Convention's dispute-resolution mechanism in chief. Part XV contains three sections: Section 1 (Articles 279 through 285) contains various general provisions and imposes upon all parties an obligation to resolve disputes peaceably; Section 2 (Articles 286 through 296) provides several forms of compulsory procedures entailing binding decisions; Section 3 (Articles 297 through 299) creates limitations on and exceptions to the compulsory procedures in Section 2. Annex V to the LOS Convention, "Conciliation," establishes conciliation procedures triggered by Articles 284, 297, and 298. Annex VII, "Arbitration," contains arbitration procedures.⁸ Given the paucity of official records, the personal notes of one participant in the negotiations (collected in a law review article) form the most useful legislative history of the LOS Convention's dispute-resolution provisions.⁹

2. *The GATT*

Article XXII, "Conciliation," and Article XXIII, "Nullification or Impairment," contain the principal dispute-resolution provisions of the

8. The focus of this article is arbitration as a method of dispute resolution. Other dispute resolution procedures provided in the LOS Convention (not examined in this article) are: special arbitration under Annex VIII, the International Tribunal for the Law of the Sea under Annex VI, and the Sea-Bed Disputes Chamber of the International Tribunal for the Law of the Sea under Section 4 of Annex VI.

9. Adede, *Prolegomena to the Disputes Settlement Part of the Law of the Sea Convention*, 10 N.Y.U. J. INT'L L. & POL. 253-54 (1977).

GATT.¹⁰ During the Tokyo Round of multilateral trade negotiations, the GATT contracting parties adopted, in the form of a "decision," the "Understanding Regarding Notification, Consultation, and Dispute Settlement"¹¹ (Understanding) with an annex entitled "Agreed Description of the Customs and Practice of the GATT in the Field of Dispute Settlement"¹² (Agreed Description). Collectively these are referred to as the "Article XXIII documents." Each of the major non-tariff-barrier codes of conduct negotiated during the Tokyo Round contains its own dispute-settlement procedure, although those are not the focus of this article.¹³

Since the 1979 Article XXIII documents were adopted, the number of cases referred to the contracting parties for settlement has increased sharply.¹⁴ Arbitral panels' decisions in these cases are printed in the GATT's Basic Instruments and Selected Documents (BISD) series.¹⁵ As evidenced by the number of law review articles he has published on the topic, Professor J. H. Jackson is the recognized American authority in the field of GATT dispute settlement.¹⁶

B. ANALYTICAL DICHOTOMIES

1. *LOS Convention: "Functional" Versus "Comprehensive"*

A dichotomy between "functional" and "comprehensive" approaches to dispute resolution arises from an analysis of the arbitration provisions that were proposed for inclusion in the LOS Convention but were rejected. As explained by Mr. Adede:

The functional approach envisioned the establishment of special settlement procedures which would produce binding decisions settling disputes arising out

10. "None of GATT's major participants have accepted the General Agreement as a 'definitive' obligation, and GATT adjudicatory bodies have usually avoided placing emphasis on the obligatory quality of GATT rules generally." Hudec, *supra* note 5, at 150. For a thorough discussion of the General Agreement's entry into force via the "Protocol of Provisional Application of the General Agreement," see J. JACKSON, *WORLD TRADE AND THE LAW OF GATT* 60-66 (1969).

11. GATT, *BASIC INSTRUMENTS AND SELECTED DOCUMENTS* (26th Supp.) at 210 (1980) [hereinafter BISD].

12. *Id.* at 215.

13. Hudec, *supra* note 5, at 148 n.4.

14. *Id.* at 182-83.

15. See, e.g., *United States—Import of Certain Automotive Spring Assemblies*, L/5333, BISD, *supra* note 11 (29th Supp.) at 107 (1983). A list of all GATT panel decisions from 1969 through 1979 is contained in an appendix to Hudec, *supra* note 5.

16. See Jackson, *GATT as an Instrument for the Settlement of Trade Disputes*, 1987 AM. SOC'Y INT'L L. PROC. 144; Jackson, *The Jurisprudence of International Trade: The DISC Case in GATT*, 72 AM. J. INT'L L. 747 (1978) [hereinafter Jackson, *Jurisprudence*]; Jackson, *Governmental Disputes in International Trade Relations: A Proposal in the Context of GATT*, 13 J.W.T.L. 1 (1979) [hereinafter Jackson, *Governmental*].

of various parts of the Convention: Procedures would be established to settle technical and scientific disputes arising from the fisheries, pollution, scientific research and transfer of technology sections of the Convention.¹⁷

The "comprehensive" approach, on the other hand, "contemplated the establishment of a Law of the Sea Tribunal, resort to the International Court of Justice, and the establishment of an ad hoc arbitral tribunal for the judicial settlement of disputes arising from all parts of the Law of the Sea Convention."¹⁸ The ultimate compromise was "a system for peaceful settlement of Law of the Sea disputes through procedures which [are] flexible enough to allow states the choice of effective modes of settlement ranging from the noncompulsory and nonjudicial procedures to the compulsory judicial ones."¹⁹

2. *The GATT: "Legalist" Versus "Antilegalist"*

The fundamental tension underlying the negotiation of the 1979 GATT Article XXIII documents arose between those favoring a "legalist" or rule-oriented approach to dispute settlement and those favoring a politically sensitive or "antilegalist" approach.²⁰ Mr. R. E. Hudec distinguishes the two approaches as follows:

A "legalist" viewpoint has supported the effort to write clearly defined rules and has urged the importance of a third-party adjudication procedure that can objectively apply such rules in disputed cases. An "antilegalist" viewpoint has emphasized the complexity of the political, social, and economic forces involved in any government's trade policy, as well as the limited power of international legal obligations in the face of such forces. This latter view has admitted that rules may have some value as guidelines, but has sought to discourage resort to adjudication, favoring more loosely structured consultation procedures in which governments seek to resolve conflicts through negotiation.²¹

A barrage of complaints by the United States during the Tokyo Round was the primary impetus for placing the reform of GATT arbitration procedures on the agenda.²² The United States' objective in adopting this "shake it by the throat" reform strategy was to convince its fellow contracting parties of the need to adopt a more legalistic framework.²³ Note-

17. Adede, *supra* note 9, at 261.

18. *Id.*

19. *Id.* at 277.

20. Jackson, *Governmental*, *supra* note 16, at 3-4. See also Professor Jackson's disparagement of the GATT dispute-resolution mechanism as allowing settlement "by reference to the relative economic or other power that the disputants possess." *Id.* at 8.

21. Hudec, *supra* note 5, at 151.

22. *Id.* at 155. Implementing the Article XXIII mechanism was not put on the agenda until 1976, thirty years after the GATT was finalized. *Id.*, at 157-58.

23. Hudec, *supra* note 5, at 155.

worthy among the complaints lodged during the Tokyo Round was the Domestic International Sales Corporation (DISC) case between the United States and the European Economic Community (EEC) involving a dispute over tax practices that allegedly constituted violations of the GATT's prohibition on export subsidies.²⁴

The most prominent proponent of legalist reform has been Professor Jackson, who relates nearly all failures in the GATT dispute mechanism to the "lack of an effective legal system for the rules concerned."²⁵ Professor Jackson has enumerated a list of weaknesses in GATT dispute resolution due to this antilegalist bias.²⁶ A short while before the contracting parties adopted the Article XXIII documents, Professor Jackson proposed a "Protocol for Resolution of Trade and Economic Disputes," which suggested a more rule-oriented approach.²⁷

Those who were hoping, as was Professor Jackson, that more legalist reforms would come out of the Tokyo Round negotiations were disappointed. The Article XXIII documents principally codified the arbitral practice that had evolved over time with "selective adjustments designed to enhance its efficiency and impact."²⁸ One writer has also observed that:

Viewed from outside the GATT's historical and institutional context, the Tokyo Round results will appear to be a rather timid response to the threat of deteriorating international discipline. To the GATT insider, however, radical

24. *Id.* at 164. For a comprehensive treatment of the DISC case, see Jackson, *Jurisprudence*, *supra* note 16.

25. Jackson, *Jurisprudence*, *supra* note 16, at 749. For an impassioned plea by Professor Jackson for a more legalist approach, see Panel, *Multilateral Trade Negotiations: Dispute Settlement*, 1980 AM. SOC'Y INT'L L. PROC. 129, 137.

26. Professor Jackson's list of weaknesses in the GATT dispute settlement mechanism includes:

(i) The procedures for initiating a complaint process are ill defined, subject to delay and arguably subject to "permission" of a political body through vote of the Contracting Parties (which may in practice necessitate agreement of the disputants); (ii) The delay plays into the hands of a "*fait accompli*" approach to trade policy. A nation will argue that while its parliament or executive considers an action and before it is implemented, it is premature for an international body or foreign government to investigate or intervene . . . ; (iii) Meager resources of personnel, staff and money may contribute to inadequate consideration of the facts and arguments of particular cases; (iv) Fact finding resources and procedures are inadequate; (v) There are inadequate procedures for reopening a complex case when a panel seems to have made a mistake; (vi) The legal effect of "findings" of a panel are ambiguous; (vii) Finally, the implementation phases of the procedures are too loose, too ill defined, and . . . involve political calculations and "trade offs" that are inappropriate to an adjudicating type procedure that needs to develop confidence and trust of future participants.

Jackson, *Governmental*, *supra* note 16, at 7-8.

27. *Id.* at 12.

28. Hudec, *supra* note 5, at 158.

reform was never a realistic possibility. The fundamental political constraints that limit GATT regulatory policy had not changed.²⁹

II. Consultation

A. GENERAL OBLIGATION TO CONSULT

1. *The LOS Convention*

Both the LOS Convention and the GATT impose an obligation to exhaust informal and peaceful means of dispute settlement prior to triggering the treaties' respective arbitration mechanisms. The LOS Convention imposes a general obligation to settle any "dispute between them concerning the interpretation or application" of the Convention in accordance with the methods set out in Article 33 of the Charter of the United Nations.³⁰ Those methods include: "negotiation, inquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies, or other peaceful means."³¹ The LOS Convention further encourages conciliation between disputing parties by inviting dispute resolution "by any peaceful means of their own choice."³² Central to this obligation to settle disputes peaceably under the LOS Convention is an obligation to exchange views expeditiously.³³ Yet another peaceful dispute-resolution mechanism exists in formal conciliation in accordance with Annex V to the Convention.³⁴

Formal conciliation under Annex V is fairly rule-oriented and roughly parallels the arbitration procedure provided in Annex VII to the Convention. Initiation of Annex V conciliation occurs only if both parties consent to the procedure.³⁵ Each party selects two of the five conciliators, preferably from a list maintained by the Secretary-General of the United Nations, and those four conciliators choose the fifth.³⁶ The conciliation commission determines its own procedure and "make[s] proposals to the parties with a view to reaching an amicable settlement."³⁷ Finally, the conciliation commission issues a report recording "any agreements reached and, failing agreement, its conclusions on all questions of fact or law relevant to the matter in dispute and such recommendations as the commission may deem appropriate."³⁸ The report is not binding on the parties

29. *Id.*

30. LOS Convention, *supra* note 2, art. 279.

31. U.N. CHARTER, art. 33, para. 1.

32. LOS Convention, *supra* note 2, art. 280.

33. *Id.* art. 283.

34. *Id.* art. 285.

35. *Id.* Annex V, art. 1.

36. *Id.* arts. 3(b)-(d).

37. *Id.* arts. 4, 6.

38. *Id.* art. 7, para. 1.

to the conciliation commission.³⁹ The conciliation is terminated “when a settlement has been reached, when the parties have accepted or one party has rejected the recommendations of the report . . . , or when a period of three months has expired from the date of transmission of the report to the parties.”⁴⁰

2. *The GATT*

The GATT expresses the consultation obligation in somewhat different terms. Article XXII of the GATT provides that each contracting party shall “accord *sympathetic consideration* to, and shall afford *adequate opportunity for consultation* regarding, such representations as may be made by any other contracting party with respect to certain enumerated obligations under the General Agreement, including all matters affecting the operations of this Agreement” (emphasis added).

Article XXIII:1 of the GATT provides that if a country should consider that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired or that the attainment of any objective of the Agreement is being impeded as the result of

- the failure of another contracting party to carry out its obligations under this Agreement,
- the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or
- the existence of any other situation

that country may “make *written representations* or proposals” to the other contracting parties “which it considers to be concerned” and those other countries shall give “*sympathetic consideration*” to such representations or proposals.⁴¹ The nullification or impairment sections of the GATT are discussed at greater length below.

The Understanding made the conciliatory resolution of disputes under Articles XXII and XXIII:1 more specific. In paragraph 4 of the Understanding the contracting parties “reaffirm their resolve” and “undertake to respond to requests for consultations promptly and to attempt to conclude consultations expeditiously with a view to reaching mutually satisfactory conclusions.” In paragraph 5 the contracting parties agree to accord special attention to the problems of less-developed countries that arise in this regard. Finally, in paragraph 6 the contracting parties agree to exhaust conciliatory methods under Article XXIII:1 before resulting to the panel procedure under Article XXIII:2. Nothing in the Understanding provides for as formal a conciliation procedure as does Annex V to the LOS Convention.

39. *Id.* art. 7, para. 2.

40. *Id.* art. 8.

41. GATT, *supra* note 1, at art. XXIII:1 (emphasis added).

B. FAILURE TO RESOLVE BY CONSULTATION TRIGGERS MORE FORMAL DISPUTE RESOLUTION

1. *The GATT*

If no “satisfactory adjustment” is reached within a “reasonable time” under Articles XXII or XXIII:1 of the GATT, the complaining party may refer the matter to the contracting parties under Article XXIII:2. Paragraph 8 of the Understanding provides that if a dispute is not resolved through consultation, the dispute is to be referred to an “appropriate body,” which is to “use their good offices with a view to conciliation of the outstanding differences between the parties.” The “appropriate body” that this paragraph refers to is the panel that can be established pursuant to Article XXIII:2.

2. *The LOS Convention*

Similarly, failure to resolve a dispute by any of the available means under section 1 of Part XV of the LOS Convention—including the means provided in Article 33 of the United Nations Charter and Annex V conciliation—makes the disputing parties subject to the compulsory procedure entailing binding decisions under section 2 of Part XV.⁴² The Convention provides a choice of four compulsory procedures, summarized as follows:

All contracting parties are covered by a compulsory procedure entailing binding decisions. If the parties to the dispute have accepted the same procedure, they will submit to that procedure [art. 287, para. 4]. If the parties have not chosen the same procedure, the dispute will go before an arbitral tribunal [art. 287, para. 5]. If any of the parties to the dispute has not chosen any procedure, Part XV deems the parties to have accepted the jurisdiction of an arbitral tribunal and the dispute is submitted thereto [art. 287, para. 3]. The parties to the dispute may agree to present the dispute to a forum other than that specified in the foregoing scheme [art. 287, paras. 3-5].IX.⁴³

III. LOS Convention Exceptions to Compulsory Arbitration

Section 3 of Part XV of the LOS Convention imposes limitations and exceptions to the compulsory procedures entailing binding decisions under section 2 of that Part. As critiqued by Mr. Gaertner:

Section Three of Part XV delineates the limitations on and exceptions to the compulsory dispute settlement provisions. The limitations on the compulsory procedures exempt certain types of disputes that arise out of the coastal State’s discretionary exercise of sovereignty with respect to the uses of its exclusive economic zone (EEZ) [art. 297]. Similarly, the optional exceptions to the pro-

42. LOS Convention, *supra* note 2, art. 286.

43. Gaertner, *supra* note 4, at 583-84.

cedures remove additional categories of disputes at the discretion of the State party involved [art. 298]. These categories include: sea boundary delimitations [art. 298, para. 1(a)], military activities and certain law enforcement measures connected with the exercise of sovereignty within the coastal States' EEZ [art. 298, para. 1(b)], and disputes over which the Security Council of the United Nations has exercised jurisdiction [art. 298 para. 1(c)].⁴⁴

These limitations on and exceptions to compulsory dispute resolution were intended to protect coastal states "from constant harassment by international proceedings arising from the exercise of their discretionary rights within the economic zone under the convention."⁴⁵ Section 3 is in keeping with the functional approach taken throughout Part XV of the LOS Convention.

The Section 3 exceptions and limitations have been criticized as excluding from the dispute-resolution mechanism the very matters that are most contentious and most in need of a routine for settlement. According to Mr. Gaertner:

These limitations and optional exceptions reduce the practical effects of the Convention because those categories which are or may be excluded . . . are the most likely to lead to dispute. The Convention apparently leaves these matters to the traditional means of dispute settlement. Moreover . . . the compulsory procedures are only applicable once the means chosen by the parties to the dispute fail. Thus parties are likely to continue to employ traditional methods of dispute settlement extensively.⁴⁶

Despite this criticism, it is unlikely that a major deviation from this functional approach would elicit the approval of the participating states.⁴⁷

44. *Id.* at 584-85.

45. Adede, *supra* note 9, at 262. For an earlier version of Article 297 *see id.* at 341; for an earlier version of Article 298, *see id.* at 344. The protection afforded less-developed countries has been criticized as unfair.

The Convention's dispute settlement mechanism is not a fair and equitable resolution to the problem of dispute settlement. The provisions reflect an inequitable bias in favor of the Group of 77 (G-77) and their goals under the New International Economic Order. The limitations and exceptions to the compulsory dispute settlement provisions show the influence of the G-77. Through the use of these provisions, the coastal State members of the G-77 can exercise a great deal of discretionary power concerning the uses of EEZs without having to submit *any* dispute to a procedure which would entail a binding decision (citations omitted).

Gaertner, *supra* note 4, at 586.

46. Gaertner, *supra* note 4, at 592.

47. *Id.* at 594. "The political feasibility . . . of eliminating these limitations completely is doubtful. The negotiations on the Convention dispute settlement provisions indicate the sensitivity of coastal States with respect to their exercise of sovereignty in the EEZ." *Id.*

IV. Scope of Jurisdiction

A. THE GATT

The “triggering criterion” for jurisdiction under the GATT is “nullification or impairment” of “any benefit accruing” to a country “directly or indirectly” under the GATT.⁴⁸ Simply stated:

If any contracting party believes a benefit it should get under the GATT has been “nullified or impaired” as a result of another contracting party’s breach or *other* measure, then it may seek consultation and if that fails, the complainant may ask the plenary GATT body to authorize (by majority vote) suspension of GATT obligations (a sort of “retaliation”) as a response.⁴⁹

A breach of obligations under the GATT by one contracting party *without* nullification or impairment of benefits accruing to a second contracting party is an insufficient basis for invoking a GATT arbitral panel’s jurisdiction, but nullification or impairment of a benefit—even if no breach of a GATT obligation has occurred—is a sufficient basis for jurisdiction.⁵⁰

Nullification or impairment results “when the ‘reasonable expectations’ of a GATT party as to its trade opportunities that should arise as a result of tariff negotiations (and possibly other GATT measures) are disappointed.”⁵¹ Professor Jackson likens the concept to the “injury” requirement for standing to sue in American jurisprudence as well as to concepts of “harm” and “damage.”⁵² Professor Jackson complains that the concept is “vague” and “ambiguous.”⁵³ In certain situations it is “presumed . . . that nullification or impairment is present, unless the defendant nation carried a burden of proof to show that there had been no nullification or impairment (*i.e.*, shows that there had been no ‘injury’).”⁵⁴ This is similar to the concept of a rebuttable presumption in American jurisprudence. A rebuttable presumption of nullification or impairment arises in situations in which there has been

- (i) a breach of the GATT legal obligation;
- (ii) the establishment of a quantitative restriction on imports; or
- (iii) establishing a new subsidy for domestic production of a product for which a previous GATT tariff “binding” was undertaken.⁵⁵

48. Jackson, *Jurisprudence*, *supra* note 16, at 754.

49. *Id.* (emphasis added).

50. *Id.*

51. *Id.* at 755; Jackson, *Governmental*, *supra* note 16, at 6.

52. Jackson, *Jurisprudence*, *supra* note 16, at 755; *see also* Jackson, *Governmental*, *supra* note 16, at 6.

53. Jackson, *Governmental*, *supra* note 16, at 5 & 7.

54. Jackson, *Jurisprudence*, *supra* note 16, at 755.

55. Jackson, *Governmental*, *supra* note 16, at 6.

B. THE LOS CONVENTION

In marked contrast with the GATT's criteria of nullification or impairment, the LOS Convention confers jurisdiction over "any dispute concerning the interpretation or application of this Convention" on Article 287 tribunals.⁵⁶ The LOS Convention further expands the jurisdiction of arbitral tribunals to "any dispute concerning the interpretation or application of an international agreement related to the purposes of this Convention."⁵⁷ These provisions are not unlike standard commercial contract clauses to submit disputes arising out of or related to the contract to an institutional arbitral tribunal.⁵⁸ This jurisdictional clause is a simplification of clauses considered earlier in the negotiations.⁵⁹

While the GATT incorporates what appears to be an ambiguous (perhaps even slippery) jurisdictional provision in the concept of nullification or impairment, and the LOS Convention appears to adopt a more straightforward approach, obtaining jurisdiction of a GATT arbitral tribunal may in practice be easier. To confer jurisdiction on a GATT arbitral panel, one need only identify a right conferred by the GATT that is affected by the actions of another country. For a LOS Convention arbitral panel to exercise jurisdiction: (1) a dispute under the Convention must be present, (2) the parties to the dispute must have consented or be deemed to have consented by application of the Montreux formula,⁶⁰ and (3) the dispute must not be one to which an exception under section 3 of Part XV applies.

V. Applicable Law

A. THE LOS CONVENTION

Both the GATT and the LOS Convention manifest an intention to resolve disputes by applying a body of international law that is largely self-contained within the respective treaties. Unlike the GATT, the LOS Convention expressly provides for the law applicable to disputes arbitrated thereunder. In fact, regardless of which of the four fora exercises jurisdiction over the LOS dispute (whether the ICJ, the International Tribunal for the Law of the Sea, a regional organization, or an Annex VII arbitral tribunal), the applicable law remains the same. Article 293 of the LOS Convention provides:

56. LOS Convention, *supra* note 2, art. 288, para. 1.

57. *Id.* art. 288, para. 2. Which international agreements are intended to be included in this language is not immediately apparent.

58. The American Arbitration Association standard clause reads in part: "Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration. . . ."

59. Adede, *supra* note 9, at 292-93.

60. For a discussion of the Montreux formula, see section VI.A. *infra*.

1. A court or tribunal having jurisdiction under this section shall apply this Convention and other rules of international law not incompatible with this Convention.
2. Paragraph 1 does not prejudice the power of the court or tribunal having jurisdiction under this section to decide a case *ex aequo et bono*, if the parties so agree.⁶¹

An earlier negotiating draft of this section provided that the court or tribunal with jurisdiction

- (1) shall apply the law of the present Convention, other rules of international law, and *any other applicable law*; and
- (2) shall ensure that the rule of law is observed in the interpretation and application of the present Convention.
- (3) The provisions of this Chapter shall not prejudice the right of the parties to the dispute to agree that the dispute be decided *ex aequo et bono*.⁶²

Two differences between the negotiating draft and the final version are noteworthy. First, the deletion of the language "other rules of international law, and any other applicable law" and its replacement with "other rules of international law not incompatible with this Convention" suggests that the Convention is meant to be a comprehensive statement of the international law of the sea. Second, the agreed-upon language alters the right to decide the dispute *ex aequo et bono* from being one of the parties' to being at the discretion of the tribunal. The language in paragraph 2 of Article 293 is similar to the formula used by the International Centre for the Settlement of Investment Disputes.⁶³

B. THE GATT

Neither Article XXIII of the GATT itself nor the Article XXIII documents adopted in 1979 contain a clause providing for the application of a certain body of law to dispute-resolution under the GATT. The triggering criteria of Article XXIII:1, however, make clear that it is the obligations imposed by the GATT that are to govern dispute resolution. Paragraph 3 of the Agreed Description provides that the functions of arbitral panels are "to review the facts of a case and the applicability of GATT provisions and to arrive at an objective assessment of" the dispute.

Other than these two implied references to GATT principles, the GATT dispute-resolution mechanism does not stipulate what law is to be applied. Perhaps the implication to be reached from this omission is that the governing law in all disputes is to be solely GATT legal principles. This

61. U.N. Doc. A/CONF.62/122 (1982) reprinted in 21 I.L.M. 1261.

62. U.N. Doc. A/CONF.62/WP.9/Rev.1, Part IV, reprinted in 5 THIRD UNCLOS OFF. REC. 190 (emphasis added).

63. Convention on the Settlement of Investment Disputes, Mar. 1965, 17 U.S.T. 1270, T.I.A.S. No. 6090, 575 U.N.T.S. 159.

conclusion is further substantiated by the standard "terms of reference" assigned by the contracting parties to Article XXIII:2 panels, which read in part "examine, in light of relevant GATT provisions."⁶⁴ Professor Jackson, however, has found an "implied invitation to act '*ex aequo et bono*' or in an equitable as opposed to a 'legal rule application' manner."⁶⁵

VI. Tribunal Selection

A. LOS CONVENTION MONTREUX FORMULA

The method for selecting a tribunal represents the central compromise between the functional and comprehensive approaches to dispute resolution under the LOS Convention. The compromise in Article 287, which is referred to as the Montreux formula, provides parties with a choice of tribunals as well as a set of rules to be applied in situations in which parties have not selected a tribunal or have made conflicting selections.⁶⁶ The Montreux formula "represents virtually an absolute compromise, giving states a choice of all the various forums. . . . The flexibility therein maintained is intended to lead to a wider acceptance of the system as a whole."⁶⁷ The Montreux formula incorporates a preference for arbitration over alternate dispute-resolution methods. First, parties may choose arbitration themselves.⁶⁸ Second, if a party to a dispute has failed to declare a choice of tribunal, that party is deemed to have consented to Annex VII arbitration.⁶⁹ Third, if the parties to the dispute have made declarations in favor of different tribunals and cannot otherwise agree, they are also deemed to have consented to Annex VII arbitration.⁷⁰

At various junctures in the negotiations, the LOS Convention drafters considered alternatives to the Montreux formula's preference for arbitration. One early proposal vested comprehensive jurisdiction over disputes arising under the LOS Convention in the newly created International Tribunal for the Law of the Sea (International Tribunal).⁷¹ This proposal provided that each signatory automatically consented to the jurisdiction of the International Tribunal, placing the onus on signatories to "contract out of" the International Tribunal.⁷² Participants in plenary debates re-

64. See, e.g., BISD, *supra* note 11, (29th Supp.) at 107; *United States-Prohibition of Imports of Tuna and Tuna Products from Canada*, *Id.* at 91-92.

65. Jackson, *Governmental*, *supra* note 16, at 7.

66. See *supra* note 43 and accompanying text.

67. Adede, *supra* note 9, at 385.

68. LOS Convention, *supra* note 2, art. 287, para. 1(c).

69. *Id.* para. 3.

70. *Id.* para. 5. An earlier version of this provision is found in U.N. Doc. A/CONF.62/WP.9/Rev.2, reprinted in 6 THIRD UNCLOS OFF. REC. 144, 146.

71. Adede, *supra* note 9, at 259.

72. See Annex VII to the LOS Convention, *supra* note 2.

jected this presumption of consent to the jurisdiction of the International Tribunal in favor of the more functional Montreux formula.⁷³ The delegate from the People's Republic of China best articulated the participants' preference for this functional approach: "[T]he question of the settlement involves the sovereignty of all states, the procedures to be followed must be chosen by the states themselves."⁷⁴

Another proposed alternative to the Montreux formula was to name the International Court of Justice (ICJ) the sole tribunal for dispute resolution. This alternative would offer several advantages.

The institution is already well-established, and no expense would be involved in setting up the necessary machinery. Also, the ICJ already has an established procedure with which the international legal community is familiar. If the parties are willing to submit their dispute to an international forum, they are more likely to use the ICJ than a forum with which they have less experience. The ICJ has had some experience in the law of the sea. This, in conjunction with the fact that the ICJ would be the sole adjudicatory forum, would avoid the undesirable effects of a multiplicity of fora.⁷⁵

Vesting sole jurisdiction in the ICJ suffered the same practical shortcoming as did vesting exclusive jurisdiction in the International Tribunal for the Law of the Sea—the participating states expressed their preference for a functional approach rather than this decidedly comprehensive approach. In addition, since it is open only to states, the ICJ would be an inadequate tribunal for LOS Convention dispute resolution, as nonstates would be disputants in LOS Convention disputes.

[P]otential parties to Law of the Sea disputes would be states, an international organization, and individuals conducting mining activities in the international sea-bed area. Accordingly, the International Court of Justice, the jurisdiction of which is open only to states (and is also not widely accepted by a large number of states), would be inadequate.⁷⁶

B. GATT PANEL PROCEDURE

The GATT itself is silent on the matter of selecting arbitral tribunals. Nothing in Article XXIII of the GATT provides for the establishment of arbitral panels nor for the arbitral procedure that is the hallmark of GATT dispute resolution. Article XXII:2 provides only that the complaining contracting party may refer the dispute to the contracting parties who "shall promptly investigate [and] make appropriate recommendations."⁷⁷

73. Adede, *supra* note 9, at 272.

74. Statement of the Representation of the People's Republic of China, 5 THIRD UNCLOS OFF. REC. 44.

75. Gaertner, *supra* note 4, at 594.

76. Adede, *supra* note 9, at 258.

77. GATT, *supra* note 1, art. XXII:2.

GATT arbitral panels developed over time in response to need. "Part of the Article XXIII process has been a tradition of appointing 'panels' of persons who are not citizens of either of the disputing parties to 'hear the case' as presented by the disputing parties, and come to some conclusion."⁷⁸

In 1979 the GATT contracting parties agreed, in the Understanding,⁷⁹ that the customary practice of establishing arbitral panels should continue.⁸⁰ The Understanding specifically provides that the party invoking Article XXIII:2 has the right to request the "establishment of a panel to assist the C[ontracting] P[arties] to deal with the matter."⁸¹ In addition, "the mere existence of the Article XXIII documents adds to the legitimacy of the panel procedure"⁸² and affirms the panel's adjudicatory role; moreover, the Article XXIII documents provide the panel with the "authority of long-established practice."⁸³

To some extent the Article XXIII documents—purporting to set out "customary practice"—are an "artful revision of GATT history."⁸⁴ The Article XXIII documents accurately portray only the GATT practice for the years during the Tokyo Round multilateral negotiations,⁸⁵ and "whether or not they accurately portray the past, they do make it clear that panels are to play this mediatory role in the future."⁸⁶ The decision to codify "customary" panel practice was made despite pressures to adopt an approach similar to that which had developed for the purpose of settling disputes under the GATT Codes of Conduct⁸⁷ or to adopt a more rule-oriented arbitration procedure.⁸⁸

Despite the adoption of the Article XXIII documents in 1979, certain procedural uncertainties remain in GATT arbitral procedure. First, the Understanding and Agreed Description do not mandate the establishment

78. Jackson, *Governmental*, *supra* note 16, at 6.

79. BISD, *supra* note 11.

80. *Id.* para. 7.

81. *Id.* para. 10.

82. Hudec, *supra* note 5, at 177.

83. *Id.*

84. *Id.* at 186.

85. The active mediatory role of arbitral panels was not a longstanding GATT "custom." Rather, it developed during the Tokyo Round multilateral trade negotiations in response to a barrage of requests by the United States in an attempt to obtain reform of the GATT dispute settlement procedure. See Panel, *supra* note 25, at 133; see also Jackson, *Governmental*, *supra* note 16, at 6.

86. Hudec, *supra* note 5, at 187.

87. For a dispute-settlement procedure, see discussion of "surveillance bodies" as an alternative in Hudec, *supra* note 5, at 168-70.

88. For Professor Jackson's recommendation that an "impartial third party panel of arbitration [be established to] . . . pursue a restrictive method of interpretation and application of agreed rules, rather than an 'expansive' method," see Jackson, *Governmental*, *supra* note 16, at 10.

of an arbitral panel after a certain period of consultation has elapsed as, for example, the GATT Code of Conduct governing subsidies does.⁸⁹ Second, the Understanding and Agreed Description do not explicitly state that the contracting parties must always grant requests for the establishment of arbitral panels nor do they provide standards for granting or denying such requests.⁹⁰ Third, the Article XXIII documents do not "address the issue of the need for a second Council decision confirming the actual composition of the panel," but recent practice seems to obviate this need.⁹¹

VII. Remedies

A. AVAILABLE REMEDIES

While the GATT provides for explicit sanctions for violations of its terms, such sanctions are rarely invoked. In its artful revision of the customary GATT practice, the 1979 Article XXIII documents incorporate a preference for mediation in every step of the dispute-resolution proceedings and provide that imposition of sanctions are the "last resort." Ironically, the LOS Convention—despite the desire of some participants in its drafting to create a comprehensive dispute-resolution scheme—does not provide for any specific sanctions.

1. *The GATT*

The GATT contains language authorizing potentially severe sanctions that are available as remedies under Article XXIII. It also provides the contracting parties with the power to "authorize a contracting party to *suspend the application* to any other contracting party or parties of *such obligations or concessions* under this Agreement as they determine to be appropriate in the circumstances."⁹² Suspending the application of obligations or concessions under the GATT means, essentially, imposing otherwise prohibited trade practices upon the violating country.⁹³ Despite this explicit grant of power, "[t]he GATT regulatory structure has never been very coercive. Technically, the GATT authorizes the use of economic countermeasures that could serve as coercive sanctions, but the GATT has chosen not to make use of this opportunity."⁹⁴ In fact, the negotiating history of the suspension power indicates that it was meant to be purely

89. See Subsidies Code, art. 18(1), H.R. Doc. No. 153, at 288.

90. Hudec, *supra* note 5, at 176.

91. *Id.*

92. GATT, *supra* note 1, at art. XXIII:2 (emphasis added).

93. Hudec, *supra* note 5, at 150 n.6.

94. *Id.* at 150.

compensatory and not punitive.⁹⁵ A 1979 survey indicated that only one case culminated in suspended obligations.⁹⁶

The Article XXIII documents emphasize that the most satisfactory "remedy" is voluntary settlement. Given this preference, the Article XXIII documents provide "a more active mediatory role [for the panels] during the adjudication proceedings, in an effort to create additional pressures for voluntary settlement."⁹⁷ In order to obtain the "remedy" of voluntary settlement, panels are to "consult regularly with the parties to the dispute and give them adequate opportunity to develop a mutually satisfactory solution."⁹⁸

GATT arbitral panels are to secure a "positive solution,"⁹⁹ and the Article XXIII documents set forth a hierarchy of permissible remedies toward achieving that end:

[1] a solution mutually acceptable to the parties is clearly to be preferred; [2] the withdrawal of the measures concerned if these are found to be inconsistent with the GATT; [3] the provision of compensation should be resorted to only if the immediate withdrawal of the measure is impracticable and as a temporary measure pending the withdrawal of the measures which are inconsistent with the provisions of the GATT; and [4] the last resort is the possibility of suspending the application of concessions or other obligations on a discriminatory basis vis-à-vis the other contracting party, . . . an action which has only rarely been contemplated [under this hierarchy].¹⁰⁰

The role of the arbitral panel in mediation to achieve the remedy of voluntary settlement is another example of the antilegalist bent of the GATT's dispute-resolution process. This role also places arbitral panels in a "troublesome" dual role as both an adjudicatory (rule-oriented) and political arbiter.¹⁰¹

2. *The LOS Convention*

Nothing in the LOS Convention sets out a preferred hierarchy of remedies for resolving disputes submitted to arbitration. Whether awards are to be merely compensatory or punitive as well is uncertain. Annex VII

95. *Id.* at 150 n.6.

96. The only case in GATT which proceeded all the way to the application of "sanctions" or suspended obligations by complaining party because of an infringement or nullification and impairment of another, was that in which the Netherlands was authorized to depart from its GATT obligations so as to limit the amount of imports of wheat from the United States, in response to the United States' quotas placed on dairy products. For several years the Netherlands applied this quota on wheat, but it seemed to have no effect on United States action mandated by Congress, concerning dairy products.

Jackson, *Governmental*, *supra* note 16, at 5 n.13.

97. Hudec, *supra* note 5, at 185.

98. BISD, *supra* note 11, para. 16.

99. Agreed Description, *supra* note 12, para. 4.

100. *Id.*

101. Hudec, *supra* note 5, at 187.

provides the only guidance in stating that awards are to be "confined to the subject matter of the dispute."¹⁰² In itself, this language provides little guidance.

B. BINDING FORCE OF DECISIONS

1. *The GATT*

Nothing in the GATT or related documents governs the finality, appealability, or binding force of final decisions. Panel findings themselves are not self-enforcing and serve merely to "assist" the contracting parties in making "objective assessment[s]"¹⁰³ so as to enable the contracting parties to reach their ultimate decision. The binding force of decisions rendered through arbitration arises from the contracting parties' implicit agreement to be held bound. In the Understanding, the contracting parties expressly recognized "that the efficient functioning of the system depends on their will to abide by the present understanding."¹⁰⁴

2. *The LOS Convention*

The LOS Convention, in comparison, is explicit on the binding effect of arbitral decisions. "Any decision rendered by a court or tribunal under this section [section 2 of Part XV] shall be final and shall be complied with by all the parties to the dispute."¹⁰⁵ The binding force of an arbitral decision is, however, limited to the parties to the dispute.¹⁰⁶ For disputes submitted to arbitration in accordance with Annex VII, the LOS Convention also provides that the arbitral panel's award will be "final and without appeal, unless the parties to the dispute have agreed in advance to an appellate procedure."¹⁰⁷ An earlier version of this provision explicitly ruled out the possibility of any appeal and was rejected as being too rigid.¹⁰⁸

C. ENFORCEMENT

1. *The GATT*

The GATT Article XXIII documents contain provisions regarding enforceability of arbitral decisions that are in the nature of ongoing sur-

102. LOS Convention, *supra* note 2, Annex VII, art. 10.

103. BISD, *supra* note 11, para. 16.

104. *Id.* para. 7.

105. LOS Convention, *supra* note 2, art. 296, para. 1.

106. *Id.* art. 296, para. 2.

107. *Id.* Annex VII, art. 11.

108. The rejected language provided that "the award shall be final and without appeal. The parties to the dispute shall immediately comply with the award." U.N. Doc. A/CONF.62/WP.9/ Rev. 1, reprinted in 5 THIRD UNCLOS OFF. REC. 193.

veillance of the decisions. As previously discussed, the contracting parties have broad sanction powers and can permit one contracting party to impose otherwise prohibited trading practices against another who violates the terms of the GATT.¹⁰⁹ The Understanding provides that the contracting parties "shall keep under surveillance any matter on which they have made recommendations or given rulings."¹¹⁰ If the decision that results from arbitration is not implemented, the party that originally brought the complaint "may ask the C[ontracting] P[arties] to make suitable efforts with a view to finding an appropriate solution."¹¹¹

2. *The LOS Convention*

The LOS Convention's enforceability provision is more standard than the GATT's surveillance provision. The LOS Convention does not expressly provide for continued surveillance of previously issued decisions, as does the GATT, but the language in the LOS Convention pertaining to "disputes as regards the . . . manner of implementation of the award"¹¹² might be cited by a diligent complaining party to pressure the participants into exercising such a function. The LOS Convention provides that:

1. Any controversy which may arise between the parties to the dispute as regards the interpretation or manner of implementation of the award may be submitted by either party for decision to the arbitral tribunal which made the award. . . .
2. Any such controversy may be submitted to another court or tribunal under Article 287 by agreement of all the parties to the dispute.¹¹³

This language does not provide for enforcement of arbitral decisions in national courts, but does provide for enforcement by both the International Tribunal for the Law of the Sea and the ICJ. The LOS Convention does not have an enforcement mechanism similar to that in the U.N. Charter that allows the Security Council to enforce ICJ decisions.¹¹⁴

VIII. Arbitration Procedure

A. INITIATION OF PROCEEDINGS

1. *The GATT*

The GATT and the Article XXIII documents provide only the barest indication of how an aggrieved contracting party is to initiate an arbitral

109. See *supra* notes 92-96 and accompanying text.

110. BISD, *supra* note 11, at para. 22.

111. *Id.*

112. LOS Convention, *supra* note 2, Annex VII, art. 12, para. 1.

113. LOS Convention, *supra* note 2, Annex VII, art. 12.

114. Gaertner, *supra* note 4, at 594.

proceeding. A contracting party who has not received satisfaction in conciliatory proceedings "within a reasonable time" may refer the dispute to the contracting parties.¹¹⁵ As discussed above, a complaining party has no right to have an arbitral panel established to settle a dispute. Rather, the decision to establish a panel is left to the contracting parties' discretion. Paragraph 4 of the Agreed Description makes clear that the establishment of an arbitral panel is a weighty matter.¹¹⁶ One commentator has noted that the threshold necessary to establish a panel has been raised.¹¹⁷

Failure to agree to a procedure for more methodical establishment of arbitral panels has resulted in practical confusion.¹¹⁸ First, "defendant" governments are able to obstruct or delay the establishment of an arbitral panel by claiming that the parties have not explored the disputed matter sufficiently in bilateral consultations.¹¹⁹ An obvious solution to these dilatory tactics would be to impose time limits for consultation in the Article XXIII documents, a step the parties did not take.¹²⁰ Second, ambiguous language in the Agreed Description has provided the defendant government with an opportunity to respond to the complaint before the Council, "suggesting that there may be some point in debating the request for a panel at [the] Council meeting."¹²¹ Indeed, the EEC protested the formation of an arbitral panel to investigate the U.S. complaint in the DISC case.¹²²

2. *The LOS Convention*

In contrast to the GATT's uncertainty, initiation of arbitration under the LOS Convention is rather straightforward. The LOS Convention provides simply that:

[A]ny party to a dispute may submit the dispute to the arbitral procedure provided for in this Annex by written notification addressed to the other party

115. GATT, *supra* note 1, art. XXIII:2. See also Agreed Description, *supra* note 12, para. 1, which reiterates the Article XXIII language.

116. Note especially the language providing that "[b]efore bringing a case, contracting parties have exercised their judgment as to whether action under Article XXIII:2 *would be fruitful*." Agreed Description, *supra* note 12, para. 4 (emphasis added). The phrase "bringing a case" departs from the otherwise antilegalist bent of the panel procedure.

117. Hudec, *supra* note 5, at 178.

118. While the failure to adopt set criteria for establishing an arbitral panel may have resulted in confusion, the failure was not unintentional. The reluctance to establish a routine procedure for formation of arbitral panels is in keeping with the GATT's antilegalist framework and further evidences a presumption in favor of settlement and consultation as opposed to formalized dispute resolution.

119. Hudec, *supra* note 5, at 171-72.

120. *Id.*

121. *Id.* at 175. "However, the Council has taken such decisions only after the party concerned has had an occasion to study the complaint and prepare its response before the Council." Agreed Description, *supra* note 12, para. 6 (ii).

122. Hudec, *supra* note 5, at 175, n.88.

or parties to the dispute. The notification shall be accompanied by a statement of the claim and the grounds on which it is based.¹²³

Constitution of an LOS Convention arbitral tribunal is not a matter of discretion for the other signatory countries, as it is under GATT practice.

B. SELECTION OF ARBITRATORS

1. *Lists of Arbitrators*

a. The LOS Convention

Both the LOS Convention and the GATT provide for the compilation of lists of qualified arbitrators. The LOS Convention permits each participating state to "nominate four arbitrators, each of whom shall be a person experienced in maritime affairs and enjoying the highest reputation for fairness, competence, and integrity."¹²⁴ The Secretary-General of the U.N. maintains this list.¹²⁵ While some proposed that arbitrators be required to be not only experienced in maritime affairs but also expert in law of the sea matters, this proposal was rejected. Problems of interpretation of the LOS Convention need not be referred to experts on the law of the sea.¹²⁶

b. The GATT

The Director-General maintains lists of GATT arbitrators who are to be "governmental and nongovernmental persons qualified in the fields of trade relations, economic development, and other matters covered by the GATT."¹²⁷ Each contracting party has the opportunity to nominate "two persons who would be available for such work."¹²⁸ Professor Jackson proposed that the 1979 Article XXIII documents impose additional qualifications on the arbitrators, i.e., that the arbitrators listed "have a judicial temperament and reputation, meaning that his judgments and opinions are considered fair and objective."¹²⁹ Professor Jackson's proposal parallels the language in the LOS Convention noted above, but the contracting parties have not adopted it.

123. LOS Convention, *supra* note 2, Annex VII, art. 1.

124. *Id.* art. 2, para. 1.

125. *Id.*

126. Hudec, *supra* note 5, at 154.

127. BISD, *supra* note 11, para. 13.

128. *Id.*

129. Jackson, *Governmental*, *supra* note 16, at 18. Despite his influence in the field and his reliance on the ICJ Charter for his proposal, Professor Jackson's proposal was not incorporated in the Article XXIII documents.

2. *Appointment and Number*

a. The LOS Convention

Appointment of arbitrators under the GATT and LOS Convention is not similar. Under the LOS Convention, each disputing party—in a manner similar to that used in commercial arbitral tribunals—nominates one arbitrator who together select by agreement three arbitrators from the list of arbitrators maintained by the Secretary-General.¹³⁰ In all cases, the number of arbitrators is to be five.¹³¹

b. The GATT

GATT arbitral tribunals, on the other hand, are established by the Director-General's proposing the composition of the panel "of three or five members depending on the case."¹³² The parties to the dispute are obliged to "respond within a short period of time, *i.e.*, seven working days, to nominations of panel members by the Director-General and . . . not [to] oppose nominations except for compelling reasons."¹³³ In practice, "it has been very hard to find qualified persons to serve on the panel who are not in one form or another 'allied' to one of the disputants."¹³⁴ This problem is, no doubt, compounded by the express preference for governmental representatives as panel members.¹³⁵ However, panel members "serve in their individual capacities and not as governmental representatives" and are not to be influenced by their governments.¹³⁶

C. TRIBUNAL'S DETERMINATION OF PROCEDURE

1. *The LOS Convention*

Both the GATT and the LOS Convention vest the responsibility for determination of procedure in the duly constituted arbitral tribunal. The LOS Convention provides that "[u]nless the parties to the dispute otherwise agree, the arbitral tribunal shall determine its own procedure, assuring to each party a full opportunity to be heard and to present its case."¹³⁷

130. LOS Convention, *supra* note 2, Annex VII, art. 3, paras. (a)-(d).

131. *Id.*

132. BISD, *supra* note 11, para. 11.

133. *Id.* para. 12.

134. Jackson, *Jurisprudence*, *supra* note 16, at 757.

135. BISD, *supra* note 11, para. 11.

136. *Id.* para. 14.

137. LOS Convention, *supra* note 2, Annex VII, art. 4.

2. *The GATT*

GATT arbitral tribunals also decide upon their own working procedures.¹³⁸ The Agreed Description provides that: (1) the disputing parties can present their views both in writing and orally in the presence of each other; (2) panel members may question both parties on any matter relevant to the dispute; (3) the panel members are to hold memoranda so designated as confidential; and (4) panel members may consult with contracting parties not directly party to the dispute as well as with other technical experts.¹³⁹

Professor Jackson has suggested that the arbitrators listed by the Director-General promulgate rules of arbitration procedure in the form of regulations, though such a step has not yet been taken.¹⁴⁰

Parties involved in GATT arbitration are admonished that "the use of the dispute settlement procedures of Article XXIII:2 should not be intended or considered as contentious acts."¹⁴¹ This statement was, in part, intended as a chastisement of "defendant governments that treated a complaint as a diplomatic insult in order to justify angry and punitive responses."¹⁴²

IX. Conclusion

It is to some degree ironic that GATT arbitration procedure, which emerged from the simple language in Article XXIII, evolved into the comprehensive system that in part surpasses the LOS Convention's arbitration procedures. Perhaps this evolution is simply a consequence of necessity. GATT arbitral practice developed as a response to growing pressures for a comprehensive system for coping with international trade disputes.

Over the course of negotiations, the arbitration provisions of the LOS Convention changed from absolutely comprehensive to very functional. From the initial proposals that all disputes be submitted to the newly created International Tribunal for the Law of the Sea, the delegates to the UNCLOS ultimately agreed upon the Montreux formula with its bias in favor of more functional arbitral panels. The delegates then carved out, in section 3 of Part XV of the LOS Convention, a host of exceptions to the compulsory procedures entailing binding decisions, which removed from the jurisdiction of arbitral tribunals the most controversial disputes that are likely to arise in the law of the sea. The evolution of the arbitration procedures under both treaties can probably best be understood in light of the intensely political negotiations from which they arose.

138. Agreed Description, *supra* note 12, para. 6 (iv).

139. *Id.*

140. Jackson, *Governmental*, *supra* note 16, at 20.

141. BISD, *supra* note 11, para. 9.

142. Hudec, *supra* note 5, at 178.